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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. ~~764~~ 50

VICTOR EMANUEL PEREIRA and
EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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IN THE

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OCTOBER TERM 1952

No. .....

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

PETITION.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Victor Emanuel Pereira and Eugene H. Brading, the petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 11, 1953 which (Hutcheson, C. J. dissenting in part) affirmed a judgment of the United States District Court for the Western District of Texas, El Paso Division, convicting the petitioners on three counts of an indictment. The indictment originally included eleven counts, eight of which were dismissed on the Government's motion (R. 209-210).

The petitioners were convicted under the first count of a charge of mail fraud (62 Stat. 763, 18 U. S. C. 1341); under the tenth count of a charge of violating the National

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Stolen Property Act (62 Stat. 806, 8 U. S. C., 2314); and under the eleventh count of a charge of conspiracy to commit the acts alleged in the first ten counts, including the eight which had been dismissed on the Government's motion (62 Stat. 701, 18 U. S. C. 371).

The single incident which is the asserted basis of Federal jurisdiction is the alleged mailing by the State National Bank of El Paso, Texas, to the Citizens National Trust & Savings Bank of Los Angeles, California, of a check drawn on the Citizens Bank by Fewel & Company to the order of Gertrude J. Joyce (who was at that time the wife of the petitioner Pereira).

Although the fraud which was the subject of the indictment was an ordinary scheme to obtain money by false pretenses, the single mailing which was an adventitious consequence of the scheme and which was the basis of the conviction of the defendants has been punished by a maximum sentence of five years on the mail fraud count, a concurrent maximum sentence of ten years on the stolen property count, and a cumulative sentence of two years on the conspiracy count (R. 261).

A petition for rehearing was filed by the petitioners in the Court of Appeals on March 26, 1953 and was denied without opinion on April 3, 1953 (Hutcheson, C. J., concurring in part and dissenting in part) (R. 292-297, 299).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. 1254(1).

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Questions Presented.

1. May the wife of a defendant in a criminal case testify, over his objection, to confidential communications made by him during the marriage, when the case involves no injury to her person or morals?

2. May the matrimonial privilege against disclosure of confidential communications be rejected on the ground that the marriage is "sham," and such communications be disclosed, in a case where the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties cohabited as man and wife and so held themselves out to the world?

3. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which charges a scheme which amounts to a conspiracy, does conviction of the conspiracy count, followed by a cumulative sentence on that count, amount to double jeopardy?

4. May there be conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so?

5. Are the boundaries of Federal criminal jurisdiction to be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved?

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Summary Statement of the Matter Involved.

The Government's case rested largely on the testimony of Gertrude J. Joyce, who, during the greater part of the period to which the indictment refers, including the times of the material misrepresentations, of the mailing, and of the consummation of the fraud, was the wife of the petitioner Pereira.

She testified that, in the company of her half sister, she casually met the two petitioners in El Paso, Texas (R. 64-65). Within two days she had invited the petitioners to become house guests at her home in Roswell, New Mexico (R. 67). The petitioners did so (R. 67). At Roswell, the petitioner Pereira received a telegram saying that his divorce would soon be granted and that he would soon receive his share of a property settlement (R. 68).

She and Pereira returned to El Paso several days later (R. 71). There were more parties in Juarez and in Roswell, including a birthday party for Pereira (R. 71).

Mrs. Joyce and Pereira took a trip to Wichita Falls (R. 72), where they spent several days (R. 79). Brading joined them there, and all three then drove to Dallas (R. 79). There they attended various parties (R. 114-115).

Mrs. Joyce and Pereira then went to Hot Springs for several days, and on to Kansas City (R. 83). The events at Kansas City were evidence of an extended course of immoderate drinking (R. 106-107).

Mrs. Joyce and Pereira were married in Kansas City on May 25, 1951 (R. 61).

Mrs. Joyce (who was now Mrs. Pereira) gave her husband funds with which he bought a Cadillac (R. 85). At Greenville they looked at the Washington Hotel; they then drove on to Dallas, where they had a private dis-

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cussion about that hotel (R. 90). Pereira told his wife that he had an option on the hotel through an agent named Wilson (R. 90).

She proposed that she have Fewel & Company, her brokers in Los Angeles, sell some securities so that she could go into the hotel deal with him (R. 90).

On June 2, 1951, Mr. and Mrs. Pereira returned to Roswell (R. 92). On June 11, 1951, Pereira told his wife that he had called Wilson's office (R. 92). He later received a telegram signed in the name of Wilson, purporting to extend the option (R. 93).

Mrs. Pereira received a check of Fewel & Company for $35,286.78 drawn on the Citizens National Trust & Savings Bank of Los Angeles, as the proceeds of the sale of certain securities (R. 93, 95). She and Pereira went to El Paso; she endorsed the check to him; and he there deposited it with the State National Bank for collection (R. 94).

Kathryn Joyner, the half sister of Mrs. Pereira, corroborated her testimony as to the circumstances under which they first met the petitioners (R. 140). She testified that Mrs. Pereira never said anything to her about these financial transactions (R. 143).

The clerks of the Denver courts testified that there was no divorce case to which Pereira was a party (R. 144, 160). The lessee of the Washington Hotel and a representative of the owner denied knowledge of any option to Pereira, but the lessee testified that there had been a considerable amount of activity by interested persons looking generally toward the purchase of the fee ownership as well as the lease (R. 149, 161-167).

There was no direct testimony as to the transmission of the check of Fewel & Company to California by mail. An officer of the State National Bank testified that, according to the bank's records, it was entered for collection

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and sent by mail to the Citizens National Bank with instructions to "wire fate" (R. 190-191); that wire advice of payment was later received; and that payment was made (R. 192). A clerk of the bank testified as to the deposit of the check by Pereira and later payment to him (R. 200-202).

After dismissal of eight counts charging mail fraud, the jury convicted the petitioners of the charge of mail fraud under the first count, of transporting stolen property under the tenth count, and conspiracy under the eleventh count (R. 259). The sentence of the Court was the maximum confinement under Count One, five years; the maximum confinement under Count Ten, ten years, to run concurrently; and a cumulative sentence of two years under Count Eleven (R. 261).

The Court of Appeals affirmed the judgment, Hutcheson, C. J., dissenting in part. In the portions of the opinion involved in this petition, the Court held that the testimony of Mrs. Pereira (now once more Mrs. Joyce) was in general admissible against her husband by reason of the divorce prior to the trial. It held, moreover, that the petitioner Pereira could not assert his privilege against the disclosure of confidential matrimonial communications made to his wife during the marriage, because as far as he was concerned the marriage was a mere "sham and pretense". The Court held that when the check of $35,286.78 received by Mrs. Pereira from her brokers and endorsed by her to him was mailed for collection by the El Paso bank to the Los Angeles bank on which it had been drawn, that mailing constituted the mailing referred to in the first count, the interstate transportation of a security obtained by fraud as charged in the tenth count, and the culmination of the conspiracy charged in the eleventh (R. 279-289).

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Hutcheson, C. J., concurred in the affirmance as to both petitioners on Count One, the mail fraud count, and as to Pereira on Count Ten, the transportation count. He dissented as to Brading on Count Ten because proof that Brading caused the transportation was wholly lacking. He also dissented as to both petitioners on Count Eleven, the conspiracy count, on the ground that conviction as to that count and the cumulative sentence amounted to double jeopardy; and on the further ground that, as discussed in *United States* v. *Crimmins*, 123 F. 2d 271 (C. C. A. 2d), the fact that a jury might have found the petitioners guilty of the substantive offense did not authorize a conviction of the conspiracy. (R. 289-290)

Statutes Involved.

62 Stat. 763, 18 U. S. C. 1341 (Mail Fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

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62 Stat. 806, 18 U. S. C. 2314 (National Stolen Property Act):

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

62 Stat. 701, 18 U. S. C. 371 (Conspiracy):

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Reasons for Granting the Petition.

1. In holding that the wife of a defendant in a criminal case may, over his objection, testify as to confidential communications made to her by him, the Court of Appeals has decided a question of Federal law, arising under Rule 26 of the Federal Rules of Criminal Procedure, in conflict with applicable decisions of this Court in *Bassett* v. *United States,* 137 U. S. 496, and *Blau* v. *United States,* 340 U. S. 332.

2. The Court of Appeals has decided important questions of Federal law which have not been, but should be, decided by this Court, as follows:

a. Under Rule 26 of the Federal Rules of Criminal Procedure, and *Lutwak* v. *United States,* 344 U. S. 604, is a marriage "sham" so as to avoid a defendant's

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privilege against the disclosure of confidential communications made to his wife, in a criminal case involving no offense against her person or morals, when they were married without express or implied reservation, and have consummated the marriage, cohabited as man and wife, and held themselves out as married?

b. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, does conviction on the conspiracy count, followed by a cumulative sentence on that count, amount to double jeopardy?

c. May a defendant properly be convicted of the substantive offense of transporting stolen property although there is no proof that he transported or caused to be transported the property in question across state lines, or knowingly assisted in the transportation?

3. The decision of the Court of Appeals is in conflict with the following decisions of other circuits:

a. With *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2d), in holding confidential communications made by a defendant to his wife to be admissible against him;

b. With *United States* v. *Crimmins,* 123 F. 2d 271 (C. C. A. 2d), in holding that a charge of a conspiracy to commit a large number of substantive offenses may be sustained although most of the substantive counts have been dismissed and are unsupported by proof.

4. This Court should exercise its power of supervision to correct a departure from the usual course of procedure in unwarrantably extending Federal criminal jurisdiction into a field which is the proper realm of local law enforce-

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ment authorities, since the mailing which is the jurisdictional fact was not proved.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding said Court of Appeals to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket, No. 13980, Victor Emanuel Pereira and Eugene H. Brading, Appellants, versus United States of America, Appellee, to the end that this cause may be reviewed and decided by this Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reviewed by this Court, and that this Court grant such other and further relief as may be proper.

Dated, April 30, 1953.

CHARLES L. SYLVESTER,
WILLIAM H. FRYER,
SIDNEY G. KINGSLEY,
Counsel for Petitioners.

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IN THE

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OCTOBER TERM 1952

No. .....

VICTOR EMANUEL PEREIRA and EUGENE H. BRADING,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

There was no opinion in the District Court. The majority opinion in the Court of Appeals and the dissenting opinion of Hutcheson, C. J., are not yet reported, but are in the record at pages 279-290.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 11, 1953. The date of the denial of the petition for rehearing is April 3, 1953.

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2. The statutory provision which is believed to sustain the jurisdiction of this Court is 62 Stat. 928, 28 U. S. C. 1254(1).

III.

Statement of the Case.

The case has already been stated in the preceding petition for review by certiorari (at pages 4 to 7), which is respectfully adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Court of Appeals erred in holding that the wife of a defendant in a criminal case may testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals.

2. The Court erred also in holding that the matrimonial privilege against disclosure of confidential communications may be rejected on the ground that the marriage is "sham", and such communications disclosed, in a case where the marriage was undoubtedly valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited as man and wife but so held themselves out to the world.

3. The Court erred, further, in holding that when an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each

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of which itself charges a scheme which amounts to a conspiracy, conviction of the conspiracy count followed by a cumulative sentence on that count does not amount to double jeopardy.

4. The Court erred in holding that there may be a conviction of conspiracy to use the mails to defraud and to transport stolen property across State lines in the absence of evidence of any agreement to do so.

5. The Court erred in holding that the boundaries of Federal criminal jurisdiction may be extended into the proper domain of local law enforcement authorities in order to deal with transactions amounting to ordinary larceny by fraud, through interpretation of the mail fraud and stolen property statutes, where the jurisdictional facts, the use of the mails and the transportation in interstate commerce, are not proved.

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ARGUMENT.

Summary of the Argument.

Point I. Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

Point II. When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Point III. In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

Point IV. The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

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POINT I.

Under Rule 26 of the Rules of Criminal Procedure and the decisions of this Court, the wife of a defendant in a criminal case may not testify, over his objection, to confidential communications made by him during the marriage, where the case involves no injury to her person or morals. The matrimonial privilege against disclosure of confidential communications may not be rejected on the ground that the marriage is "sham" when the marriage was valid as between the parties, there was no express or implied reservation by either, the marriage was consummated, and the parties not only cohabited but held themselves out as man and wife.

The evidence which, in the view of the Government, shows that the delivery by Mrs. Pereira of the check of Fewel & Company to her husband was obtained by fraud, was largely her own testimony. At the time of the incidents as to which she testified, she was the wife of the petitioner Pereira. They were married on May 25, 1951 (R. 61), and the incidents as to which she testified occurred thereafter during May and June (R. 84-93). They were not divorced until November 16, 1951 (R. 61), more than a month after the date of the indictment (R. 47) and less than two months before the trial (R. 58).

Under continuing objection on the ground that her testimony related to confidential communications between husband and wife (R. 62), she testified to the following alleged conversations and events, among others:

She sold some securities in California and obtained from her brokers, Fewel & Company, a check for $6,956.55 (R. 84, Gov. Ex. G-3). She gave her husband this check when

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a Cadillac automobile which he was purchasing was ready for delivery (R. 85). He stated that the car would cost $4,750 (R. 85). She told him that she wanted the rest of the money returned to her, and he replied that they would settle all that later (R. 85). He kept the money and did not return it to her (R. 84).

Over the same objection, which was explicitly reiterated (R. 89), she was permitted to relate the following conversation: Pereira said that if she wanted to go in with him on the investment, he could buy the Washington Hotel for $75,000 (R. 89-90). She told him that she had some securities she could sell, on which she was not making a large return (R. 90). She said that she knew that he was capable and she trusted him; and she offered to sell the securities (R. 90). When she was unable to reach her brokers by telephone, he suggested that she telephone them when they returned home (R. 90). He said that he had a broker named E. J. Wilson in Fort Worth, whom he was going to see about this deal, and that he had not really made up his mind about it until she said she would put up the money (R. 90). When Pereira returned after an absence he reported that they had obtained the hotel "for a song"; that there was an old man running it for years who wanted to get rid of it; that is was a wonderful deal, and that he had an option on it (R. 90).

Under the same objection, she was permitted to testify that her husband went to Fort Worth to see about the hotel, told her he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 91-92). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 92). About June 15, her husband told her that he had obtained an extension of the option (R. 93). When

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the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody in Roswell, her home town, to know about the deal (R. 93). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 94). He later told her that he had done so (R. 94). That evening, June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 98).

Rule 26 of the Federal Rules of Criminal Procedure provides in part:

> "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

We assume for the purposes of this petition that the divorce, although it occurred after the date of the indictment and shortly before the trial, rendered academic the question whether Mrs. Pereira could testify against her former husband. 8 WIGMORE, EVIDENCE, Sec. 2237. But the husband's privilege against disclosure of confidential communications by him to his wife, which is the privilege here asserted by Pereira, is quite distinct from the general privilege excluding the testimony of one spouse against the other. *Wolfle* v. *United States,* 291 U. S. 7, 13-14. It is settled that the special marital privilege against the disclosure of confidential communications, as distinguished from the general privilege prohibiting testimony by one spouse against another, survives a divorce.

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8 WIGMORE, EVIDENCE, Sec. 2341(2);
United States v. *Mitchell*, 137 F. 2d 1006 (C. C. A. 2d);
United States v. *Walker*, 176 F. 2d 564 (C. A. 2d).

In *Bassett* v. *United States*, 137 U. S. 496, in reversing a conviction for polygamy on the ground that the testimony of the lawful wife as to disclosures by her husband of his second marriage was improperly permitted, this Court sustained the following single assignment of error (see 137 U. S. at 497):

> "The District Court erred in permitting Mrs. Sarah Bassett, the former legal [i. e. the first] wife of the plaintiff in error, against his objection, to testify to a confidential communication made to her by him, while they were husband and wife, and not in the presence of any other person."

Brewer, J., speaking for the Court (at 505) quoted from *Stein* v. *Bowman*, 13 Pet. 209, 222, in which Mr. Justice McLean said:

> "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to incriminate her husband, *or to disclose that which she has learned from him in their confidential intercourse.*" (Italics supplied.)

Bassett v. *United States* was decided under statutes which were, like Rule 26, declaratory of the common law. (See 137 U. S. at 504; 2 WIGMORE, EVIDENCE, Sec. 488, p. 574; *Overton* v. *State*, 43 Tex. 616, 618-9). The opinion of this Court in the *Bassett* case was clearly based upon the common law privilege against the disclosure of confidential marital communications. As recently as *Blau* v. *United*

States, 340 U. S. 332, 333-334, the Court reaffirmed that it had "no doubt" as to the privilege.

See also *United States* v. *Walker,* 176 F. 2d 564, 567 (C. A. 2d).

Assuming that the privilege against the disclosure of confidential marital communications is limited, like the privilege against anti-marital testimony, to exclude cases where the alleged injury is to the wife's person or her morals (8 WIGMORE, EVIDENCE, Sec. 2338), this is clearly not such a case as falls within the exception. It does not involve any offense against her person, or subjection of her to any moral degradation such as appears in the Mann Act cases. See *Shores* v. *United States,* 174 F. 2d 838 (C. A. 10th); *United States* v. *Mitchell,* 137 F. 2d 1006 (C. C. A. 2d).

The observation in *Blau* v. *United States,* 340 U. S. 332, 333, that marital communications are "presumptively confidential" means simply that they are deemed to be confidential unless the contrary is proved. 8 WIGMORE, EVIDENCE, Sec. 2336, cited at 340 U. S. 332, 333. These conversations and communications occurred between husband and wife in private, and neither in the presence of nor through any other person. There is no evidence that they were intended for transmission to others, or that they were not intended to be confidential; indeed, the reverse is the case. That all of these conferences and communications were in fact confidential is shown by the fact that Mrs. Pereira disclosed nothing of them to her sister (R. 143) and asked that Pereira refrain from discussing them with Brading (R. 133).

The Court of Appeals recognized that the communications and conversations which are the basis of the Government's case were confidential and privileged, saying:

> ". . . Her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce. [Citing authorities]" (R. 284).

The Court held, however, that "insofar as the defendant Pereira was concerned" the marriage relation was merely a sham used as a means to perpetrate a fraud, and that the privilege against disclosure of confidential communications was not available to him (R. 284).

This was error. There is no question that the marriage was valid as between the parties; indeed, the divorce was a conclusive adjudication to that effect. 2 FREEMAN, JUDGMENTS (5th ed. 1925) Sec. 906; See *Williams* v. *North Carolina,* 325 U. S. 226, 232. There was no express or implied reservation by either party. The marriage was consummated, they cohabited as man and wife, and they held themselves out to the world as married (R. 83, 87, 91, 92, 94, 100, Govt. Ex. G-5, 136, Govt. Exs. G-6, G-7, G-8, G-9, 101-106, 127).

In *Lutwak* v. *United States,* 344 U. S. 604, in which this Court held that the wives of the defendants were competent witnesses against their husbands, and by inference free from the privilege against disclosure of marital communications, the marriage ceremonies were indeed sham, being entered into under explicit agreements that the ceremonies were to be of no effect. The parties never cohabited as spouses, and never intended to do so; and the marriages were properly held to be void *ab initio* (344 U. S. at 613-615). The case at bar, however, is more than even a "limited purpose" marriage, to which this Court referred as presenting a different problem (344 U. S. at 612).

The authorities cited by the Court of Appeals (R. 284-285) as avoiding the privilege against confidential commu-

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nications in this case are not in point. Indeed, that Court has misread 8 WIGMORE, EVIDENCE, Sec. 2230, n. 3. The passage cited, referring to the privilege against anti-marital testimony, says that the benefits of the privilege

> ". . . are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness *after service of subpoena* and thus creating 'ad hoc' a domestic peace which is to be jealously safeguarded." (Italics in original.)

It is clear that the Court of Appeals has simply misread this passage as saying "are *not* gained", and thus innocently reversed its meaning. The actual text supports the petitioners' contentions. In the *Lutwak* case this Court recognized the validity, for the present purpose, of a marriage entered into in order to render the wife incompetent as a witness. 344 U. S. at 612.

Clark v. *U. S.*, 289 U. S. 1, 14, cited by the Court of Appeals, did not involve the marital privilege, but concerned the "inveterate but vague tradition" (289 U. S. at 13) against a juror's testifying regarding the jury's deliberations. The importance of that "privilege" cannot be compared with that of the privilege against disclosure of marital confidential communications, in weighing the social values for and against its refusal.

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POINT II.

When an indictment charges a conspiracy to commit the same offenses charged in a number of substantive counts, each of which itself charges a scheme which amounts to a conspiracy, conviction on the conspiracy count, followed by a cumulative sentence, amounts to double jeopardy.

Hutcheson, C. J., dissented from the decision of the Court of Appeals sustaining the conviction on the eleventh count, which charged a conspiracy to commit the offenses charged in the first ten substantive counts. The second to ninth counts inclusive, which all charged a scheme to commit mail fraud, were dismissed on the Government's motion (R. 209-210). In his dissent Hutcheson, C. J., aptly said (R. 290):

> "I am in no doubt that as a general rule a conspiracy count and a substantive count cannot be said to charge the same offenses so that one excludes the other. I am equally in no doubt, however, that where, as here, the indictment merely charges that the conspiracy was to commit the same offenses charged in the substantive counts, a conviction on two of those counts and a dismissal of all the others, followed by a conviction and cumulative sentence on the conspiracy count, is to run a good principle into the ground, and make double jeopardy of the conspiracy count and the sentence on it."

This Court has recognized that the conspiracy statute is being much abused, and has been carried beyond the theory which supposes a serious and substantially continued group scheme for cooperative law breaking; and that the joinder of conspiracy and substantive counts

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especially is being used arbitrarily and harshly. *Pinkerton* v. *United States,* 328 U. S. 640, 644, n. 4.

Each of the substantive counts alleges that the two petitioners joined in a scheme to commit the acts which the conspiracy count charges them with conspiring to commit (R. 48-55). Under the terms of this indictment it is plain that, as this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> "A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy."

The scheme thus charged in the eleventh count is precisely the same as that charged in the nine substantive counts. By its terms it alleges that the petitioners (R. 52-53)

> ". . . unlawfully and knowingly conspired to commit the various offenses against the United States which are fully described and set out in the first ten counts of this indictment . . ."

As this Court held in *Braverman* v. *United States,* 317 U. S. 49, such an indictment, taken as a whole, charges only one offense and may be the basis of only one punishment:

> "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one" (317 U. S. at 53).

See also:

Sealfon v. *United States,* 332 U. S. 575.

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POINT III.

In the absence of evidence of any agreement to use the mails to defraud or to transport stolen property across State lines, a count charging conspiracy to commit those offenses must fall.

In dissenting from the conviction of the petitioners on the eleventh count charging a conspiracy (R. 52-53) to "commit the various offenses . . . which are fully described and set out in the first ten counts," Hutcheson, C. J. said (R. 290):

> "I dissent from the conviction on this count further, on the ground fully discussed in *U. S.* v. *Crimmins,* 123 F. 2d 271, that it does not follow, because a jury might have found the defendants guilty of the substantive offense, that they were justified in finding them guilty of a conspiracy to commit it.
>
> "In this case, while it was not necessary to prove, under the substantive offenses, that the parties agreed in advance to use the mails and transported stolen securities, it was necessary in proving the conspiracy count to prove that they did so agree.
>
> "While, therefore in this case, I think the evidence is sufficient as to both defendants to show a violation of substantive count one and the use of the mails in carrying out the scheme, I do not believe that the evidence is sufficient to show that the parties entered into a conspiracy, that is agreed to use the mails under the first count or transport securities under the tenth."

There is no evidence that the petitioners agreed to use the mails to carry out a scheme to defraud, and there is no evidence that they agreed to transport stolen property across State lines. A conspiracy to use the mails to effect

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a scheme to defraud can be proved only by proof of all of the elements of that offense, including an agreement to use the mails for that purpose. *United States* v. *Cohen,* 145 F. 2d 82 (C. C. A. 2d). Similarly, a conspiracy to transport stolen property in interstate commerce requires proof that the parties agreed to transport the stolen property in interstate commerce. *United States* v. *Crimmins,* 123 F. 2d 271 (C. A. 2d); *Cf. Fulbright* v. *United States,* 91 F. 2d 210 (C. C. A. 8th).

As the Second Circuit said in *United States* v. *Crimmins,* 123 F. 2d 271, 273, per Learned Hand, J., in reversing a conviction of conspiracy to transport stolen securities:

> "But it does not follow, because a jury might have found him guilty of the substantive offense, that they were justified in finding him guilty of a conspiracy to commit it. Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it; not indeed in its details, but so far as concerns those terms which constitute the substantive crime. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding [citing cases]. And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts."

As Hutcheson, C. J. pointed out (R. 290), there was no evidence that Brading agreed to transport or caused to be transported the check in question and therefore no basis for his conviction of the offense of conspiracy. *Gable* v. *United States,* 84 F. 2d 929 (C. C. A. 7th); *Langer* v. *United*

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States, 76 F. 2d 817 (C. C. A. 8th). In the absence of such an agreement by Brading, we are left with the impossible proposition that Pereira conspired with himself. There is thus no ground for the conviction on the conspiracy count of either of the petitioners.

POINT IV.

The conviction of the petitioners of the substantive offenses of using the mails to defraud and of transporting stolen property was unsupported by proof of the crucial fact of the mailing, and represents an unwarranted extension of Federal criminal jurisdiction into the proper domain of local law enforcement authorities.

It is well established that the jurisdictional fact of the mailing is the gist of the offense of using the mails to defraud, and must be proved by competent evidence in order to sustain a substantive count charging that offense. *Rosenberg* v. *United States,* 120 F. 2d 935 (C. C. A. 10th); *Whealton* v. *United States,* 113 F. 2d 710 (C. C. A. 3d); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d).

The mailing may of course be proved in appropriate fashion by circumstantial evidence or by reference to an established customary practice. *Decker* v. *United States,* 140 F. 2d 378 (C. A. 4th). The same considerations necessarily apply to a substantive charge of transporting stolen property by means of the mails; the interstate transportation is the gist of the offense. *United States* v. *Handler,* 142 F. 2d 351 (C. C. A. 2d); *United States* v. *Sheridan,* 329 U. S. 379, 386-390.

The evidence in support of the mailing was the testimony of an officer of the State National Bank, with which Pereira deposited the check for collection (R. 186-193).

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The witness had no personal knowledge of the transaction (R. 192-193). His testimony that the mailing occurred was merely an interpretation of an unidentified record which was not introduced in evidence (R. 190-191). The alleged letter of transmittal was not in evidence (R. 192), nor was there any evidence of any customary practice of mailing to support the bank's record in order to establish a basis for its admission if it had been offered.

This evidence was insufficient to prove that the mails were used. *Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7th); *United States* v. *Baker,* 50 F. 2d 122 (C. C. A. 2d). The question was appropriately reserved by the petitioners' motion for acquittal for failure of proof (R. 217-218, Pars. I, III, VI).

This Court's supervisory power should be exercised in order to correct this unwarranted extension of Federal criminal jurisdiction into a field which is the proper realm of local enforcement authorities. Federal criminal jurisdiction itself depends, in this case, on the fact of the mailing; and that jurisdictional fact was not proved.

Conclusion.

It is respectfully submitted that, for the reasons stated, this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Respectfully submitted,

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